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Second Financial Sector Strategy Conference Held

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From December 4-5, 1997, more than 200 Assistant United States Attorneys (AUSAs) and federal and local law enforcement agents from 20 core money laundering districts attended the Second Money Laundering Financial Sector Strategy Conference in Washington, D.C. This was a follow-up to the first joint conference, sponsored by the Departments of Justice and Treasury, which was held in May 1997. Like the first conference, the second was co-chaired by Deputy Assistant Attorney General (DAAG) Mary Lee Warren and Treasury Under Secretary Raymond Kelly. The objectives of the conference were: (1) to carry forward the recommendations of the May 1997 conference; (2) to acquaint the participants with new anti-money laundering developments both domestically and abroad; and (3) to discuss ideas for attacking, through a financial sector approach, the laundering of drug proceeds in, through, and out of the United States.

At the opening of the conference on December 4, DAAG Mary Lee Warren noted that Attorney General Reno had recently sent a memorandum to all United States Attorneys, stating that the "[t]argeting and ultimately dismantling of the drug and other cash proceeds money laundering capabilities of organized criminals both at home and abroad must be a priority of the Department of Justice." The memorandum further stated that "[t]he Departments of Justice and the Treasury are committed to identifying and attacking drug proceeds money laundering through a coordinated, national approach targeting specified sectors of the financial system." In the memorandum, the Attorney General requested that

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every district should identify a "cash proceeds money laundering contact" and provide the contact name to the Chief of the Asset Forfeiture and Money Laundering Section. A similar memorandum was also sent to FBI Direcotr Freeh and DEA Administrator Constantine.

discussing the Colombian Black Market Peso Exchange (BMPE) system. *See* story, page 12. The goal of the drug proceeds money laundering system is to change drug dollars generated in the United States into pesos which can be used and enjoyed by the Colombian drug cartels who produce the drugs. The BMPE system, which predates the drug epidemic in the United States, is the primary

It is necessary to understand how the BMPE system works in order to understand how it can best be attacked and disrupted.

On December 3, immediately proceeding the conference, interagency working groups convened to examine and discuss two specific money laundering methods: the use of money orders to launder drug cash proceeds and the shipping of bulk cash into and out of the United States. Representatives from these working groups reported their findings at the conference and made recommendations on enhancing enforcement in these areas. The money order working group was led by a representative of the U.S. Postal Inspection Service (USPIS). The bulk cash working group was led by representatives of the U.S. Customs Service.

During the working group meetings and the conference, a great deal of time was spent

mechanism by which this conversion is accomplished. Consequently, it is necessary to understand how this system works in order to understand how it can best be attacked and disrupted. The BMPE system was driven originally by the efforts of Colombian businessmen who needed U.S. dollars for international business transactions to avoid the very high Colombian excise and other business taxes. However, the system is now driven principally by the need of the drug traffickers to launder their drug dollars. After the drugs are sold in the United States, the system works as follows:

- A cartel in Colombia enters into a "contract" with a money broker, usually in Colombia, to sell its U.S. dollars to the broker's U.S. agent.
- Once the U.S. dollars are delivered to the broker's U.S. agent, the peso exchanger in Colombia deposits the agreed upon equivalent in Colombian pesos into the cartel's account in Colombia.
- The money broker now must introduce the drug dollars into the U.S. banking system, either by structuring the money into bank accounts in the United States, or by shipping the money out of the country and introducing it into the banking system outside of the United States.
- The money broker now has a pool of laundered funds in U.S. dollars to sell to Colombian importers, who use the dollars to purchase goods either from the United States or from collateral markets.

Once there is an understanding of this basic system, it is possible to address its vulnerabilities and identify where it can be attacked. Moreover, rather than attacking an unrelated series of phenomena, it is possible to attack this system strategically and understand how each tactic employed by law enforcement fits into the larger picture of attacking this system. The topic of money orders was chosen for the subject of one working group because money orders, both postal money orders and private issue money orders, are a vehicle used for converting cash into monetary instruments, which

can be deposited into the banking system or sold on the BMPE system. Bulk cash smuggling is another critical aspect of the system because increased effectiveness in attacking cash proceeds laundering in the United States results in more cash being shipped out of the country.

USPIS's Suspicious Transaction Report was one of the topics discussed in the money order working group. This new report was introduced in April 1997, and suspicious transactions are now being reported by USPIS, who is working with the Internal Revenue Service's (IRS's) Detroit Computing Center to ensure that the information contained on these forms will be available nationwide to all federal law enforcement agencies during 1998 to the same extent that CTRs, CMIRs, and SARs are available. The group also discussed the Form 8300 requirements set forth in 26 U.S.C. § 6050I. Since 1992, the definition of "cash" for purposes of Form 8300 reporting has been expanded to include not only currency but also travelers checks and money orders. (*But note*: Under the regulations, reporting of transactions involving non-currency instruments is limited to certain "designated reporting transactions.") Therefore, businesses which accept money orders in excess of $10,000 for the sale of goods *may* be required to file the Forms 8300. This is important because the use of money orders to purchase goods is a significant money laundering method.

The bulk cash working group also examined the role that bulk cash smuggling plays in the BMPE system. If cash is not laundered within the United States, it must be smuggled outside of the country. At this point, the cash must be placed into the financial system of another country or sent back into the United States. Popular methods of repatriating currency include bank-to-bank transfers (which are exempt from CMIR filing) via armored cars or through the use of couriers who do file CMIRs. Once the currency is brought back into the United States with this appearance of legitimacy, it can be deposited into bank accounts and transferred according to the needs of the traffickers or money brokers. As a result, the working group recommended that the use of armored cars and couriers be scrutinized and that the Department of the Treasury should reexamine the CMIR exemption for international bank-to-bank transfers.

Conference attendees also learned about updates on the Colombian Geographic Targeting Order (GTO), which expired at the end of October 1997. The Eastern District of New York presented a final tally that indicated an overwhelming success for law enforcement from the use of this targeting mechanism. Of the original twelve remitters targeted, three have gone out of business (indicating that a large amount of their businesses may have involved drug proceeds) and two have ceased sending remissions to Colombia. Of the balance, remissions to Colombia are down somewhere between 60 to 90 percent. There have been sixteen convictions for structuring transactions to avoid the GTO requirements.

Representatives from the Southern District of New York and the District of Puerto Rico described the effects of the Dominican Republic money remitter GTO, which went into effect in September 1997 and was renewed for

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another 60-day period in November. Initial reports revealed that the amount of currency being remitted to the Dominican Republic from Puerto Rico has been tremendously reduced, resulting in a likely switch to currency smuggling to get the money out of the country. This suspicion was validated by an increase in airport cash seizures of 385 percent during the first weeks of the GTO. Districts on the East Coast were advised to watch for increased activity in cash smuggling or placement as the launderers adapt to the new GTO.

The conference participants next heard about recent developments in Colombia and Mexico that, if fully implemented, will greatly assist law enforcement in investigating and prosecuting domestic and international money laundering cases. The participants were informed that, on July 10, 1997, the Colombian legislature passed an Anti-Contraband Law that, among other issues: (1) makes the movement of contraband exceeding $150,000 into or out of Colombia a criminal offense with a penalty of 3-6 years; (2) makes aiding and abetting the movement of contraband an offense carrying a penalty of 6-24 months; (3) requires an enhanced penalty of up to 6 years for public officials who aid and abet the movement of contraband.

A brief review of recent developments in Mexico followed, encompassing the continuing implementation of large value and suspicious transaction reporting and the development of a Financial Intelligence Unit within the Hacienda. The participants were urged to consider these Colombian and Mexican developments as their cases progressed, and to work with Headquarters to develop information to send to the Colombian and Mexican governments in order to test their political will to enforce these laws and regulations.

Finally, FinCEN presented a report on its continuing bilateral activity to reach agreements with FinCEN-type entities abroad for the purpose of exchanging information reported to those entities. The participants were urged to contact FinCEN, where financial records from a FinCEN partner country would be valuable to the investigation in order for the United States to assess the utility of these agreements.

The balance of the second day of the conference was given to district-by-district review of money laundering activity observed in each district and actions being taken to combat that activity. Each district also described how Suspicious Activity Reports (SARs) are being exploited in order to provide leads or indicate trends in money laundering. The District of New Jersey described its SAR Review Task Force, which includes prosecutors and representatives from federal and state law enforcement and regulatory agencies. The task force meets once a month and examines every SAR filed in the district. Once casinos begin filing SARs, which is expected to occur sometime next year, the SAR Review Team will include these SARs in their review. The New Jersey Task Force served as a model for using the SAR system and several other districts indicated that they were looking at adopting this approach.

Just like the first conference, this Second Financial Sector Strategy Conference provided an opportunity for money laundering prosecutors, agents, and forfeiture attorneys from around the country to look at the money laundering issue on a national level and to coordinate their efforts to maximize the results from their investigations and prosecutions. By focusing on the BMPE system, law enforcement actions on a local level take on more significance as they become part of a larger picture. Similarly, by increasing awareness of law enforcement and regulatory tools, as well as legal developments in foreign countries, we are able to attack this problem on several levels simultaneously. Attendees agreed that the continuing development of a financial sector targeting strategy was important to anti-money laundering efforts and that future meetings, on both the national and regional levels, must continue to occur.

If you would like to receive more information about this conference, please contact, via DOJ e-mail: Lester Joseph, CRM20(ljoseph), or Jeffrey Ross, CRM05(jross).

Asset Confiscation and Provisional Measures in FATF Member Countries

By John Carlson, Administrator, Financial Action Task Force Secretariat, Secretariat du GAFI, OCDE, Paris, France

The views expressed in this article are solely those of the author, and do not necessarily reflect those of the FATF or its member governments.

This article summarizes a report[1] that examined the confiscation and provisional measures taken by members of the Financial Action Task Force (FATF)[2] on Money Laundering, in relation to the laws under their domestic regimes.[3]

Domestic Confiscation Systems

Confiscation and Forfeiture Systems. The major features of member countries' confiscation laws appear on pages 10 and 11. For the purpose of this report, the major characteristics of the confiscation or forfeiture provisions were whether:

- the system was property or value based or both;
- the system applied only to drug trafficking offenses or all serious crimes;
- a conviction was required for the confiscation provisions to apply;
- the standard of proof used in the proceedings was a criminal or civil (or some other easier) standard;
- the burden of proof could be reversed in order to place an onus on the defendant to show that property was legitimately obtained or that he did not benefit from his criminal activity;
- if a conviction is required, the confiscation or forfeiture order may be made in respect to the proceeds of crimes committed (but not prosecuted) before the offense of which the defendant is convicted or against assets acquired prior to that time; and
- the property owned by third parties (persons who are not defendants to the criminal proceedings) can be confiscated.

Property or Value. All but two members have systems which allow both the confiscation of specific items of property such as the proceeds or instrumentalities of a crime and the issuance of an order based on the value of the proceeds of crime received. A large majority of the remaining members have systems where the principal method of confiscation is property based, but allow a value order to be made if that piece of property is not available for confiscation for certain reasons, *i.e.*, the defendant has removed it from the country and it cannot be located.

Drug Trafficking Offenses or All Serious Crimes. Those countries with confiscation provisions that are part of the sentencing alternatives under their general criminal law normally have systems that cover all serious crimes, indeed, all crimes. However, in addition, in certain countries the confiscation procedures are facilitated by laws, such as reversing the burden of proof, which apply only to limited categories of more serious offenses. Another group of members, such as the United Kingdom and the Netherlands, has specific confiscation legislation that applies to all serious offenses. Other members such as the United States and Canada, have a list of more serious offenses.

Necessity for Conviction. All members have confiscation laws which are part of the sentencing proceedings of the defendant, and therefore, a conviction is required. However, while conviction-based confiscation may be the normal type of confiscation used in a large majority of members, some members can also confiscate or forfeit property where no conviction has been obtained. This can take place in two ways.

The first type involves confiscation within the context of criminal proceedings but without the need for a conviction or guilty verdict. Three examples of when confiscation orders apply include:

- *Australia*: the defendant has absconded (similar provisions exist in most of the other common law countries);
- *United Kingdom and Hong Kong*: there is a civil proce-

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dure within criminal proceedings to seize and forfeit cash which is the proceeds or instrumentality of drug trafficking and is imported or exported; and

- *Austria*: in independent penal proceedings, where there is no formal finding on the guilt of the person.

Second, confiscation orders can be made entirely outside criminal proceedings, *i.e.*, civil or administrative proceedings. The following examples apply:

- *Germany and Ireland*: separate proceeding may be commenced provided that the pre-conditions are met and a confiscation order has been made, even without a conviction. In Ireland, civil proceedings can be brought to restrain and eventually confiscate property worth at least £10,000, which represents the proceeds or instrumentality of any offense.
- *Italy*: non-criminal confiscation proceedings may occur *in absentia* against the alleged offender on the authority of the court.

Standard of Proof. Confiscation is normally regarded as part of the punishment of the defendant, although in some cases, it can also be said to have a non-punitive purpose.[4] As part of the penal proceedings, it is therefore not surprising that the standard of proof applicable in most members is the criminal standard applicable to a sentencing hearing in their country. In those member countries that follow a common law system, it is possible for the government to prove its case to the civil standard of the proof. The Norwegian system requires that the prosecution must prove to the criminal standard that the defendant obtained proceeds from the offense, but is allowed to prove the value of those proceeds to the civil standard. In Denmark, if the amount of the proceeds cannot be sufficiently established, then an estimated sum determined to be equivalent to that amount may be confiscated.

Reversal of Burden of Proof. For the majority of members, the burden of proof is placed on the government to show that assets are the proceeds of crime or the defendant has derived a certain value amount as his proceeds of crime. All but three of those ten members, which allow the burden of proof to be placed on the defendant, have legislated this power as a discretionary power held by the court. Such power can usually be exercised when the government has presented some evidence to suggest that the asset may be criminally derived or that the defendant could not have acquired the asset when taking into account his legitimate income. Some examples of reverse burden provisions are:

- *Australia*: there is automatic forfeiture of any assets restrained in drug trafficking or money laundering cases six months after conviction if the defendant does not prove they were legitimately acquired;
- *Austria*: the onus of proof may be partially reversed in cases where there have been repeated commissions of crimes over a period or where the defendant is a member of a criminal organization;
- *France*: There are two provisions. The first relates to a person convicted of drug trafficking or money laundering and allows the court to confiscate all the defendant's property, whether legitimately acquired or not. The second provision makes it a criminal offense for a person who carries on habitual relations with a drug trafficker or user if the person is unable to provide evidence of a legitimate source of funds commensurate with his lifestyle. If convicted, the person's property would be subject to confiscation. In this second case, the burden of proof is reversed for the criminal offense itself;
- *Italy*: The property of a person who has been convicted of certain offenses in connection with the Mafia, such as drug trafficking or extortion, can be liable to confiscation if the person cannot justify the origin of the property and the

property is disproportionate to the person's legitimate income. The confiscation proceedings may run parallel to the criminal proceedings, and the court may order the amount, which is disproportionate to legitimate income, to be confiscated; and

- *United Kingdom*: The court makes a wide range of assumptions about the illicit origin of the property upon the request of the prosecutor in drug trafficking cases.

Link Between Conviction and Confiscation. Can members obtain an order for confiscation that relates directly to the proceeds of crime from the criminal offense of which a person has been convicted? Can the confiscation order be sought in relation to the proceeds of previous crimes of which the person has not been convicted? Many countries — whether with a property or value system — which allow the burden of proof to be reversed, can make a confiscation order which confiscates the proceeds of crimes other than for the offenses of which the defendant is currently convicted. Canada and the Netherlands are unique in terms of having a post conviction system which allows the confiscation of property for the proceeds of previous crimes for which confiscation is allowed and which have not been prosecuted, but yet they do not have a provision that allows the burden of proof to be reversed. In contrast, France can confiscate such property for serious offenses relating to drug trafficking, even if the property is legitimately acquired.

Third-party Property. A large majority of members have laws which, while respecting the rights of bona fide third parties, allow the confiscation of the proceeds of crime, or property of equivalent value in a value-based system, from third parties who are not themselves defendants. Examples of situations where property held by third parties who are not charged with a criminal offense may be subject to confiscation are: the person knew[5] that the property was derived from crime; the property was a direct or indirect gift from a defendant; or the property was still subject to the effective control of the defendant.

Provisional Measures. All members have legislation that provides their law enforcement agencies with the power to seize property, which may become subject to a confiscation order as the proceeds of, or an instrumentality of, a criminal offense. Similarly, most jurisdictions have the power to freeze or obtain some form of order to secure such property — or in a value-based system any property — so that a confiscation order can ultimately be enforced against the property. Such powers can be exercised prior to the person being arrested and charged in most members, even though the seizure or freezing of the property can usually only be maintained for a limited period of time if no charges are pending. In order to obtain an order, it is usually necessary to have sufficient evidence to satisfy the court: (1) the person committed the offense; (2) the person benefited from the offense; or (3) the property is the proceeds of that offense. In a significant number of member countries, it is also necessary to show that the property has been frozen in order to ensure that it become available if a confiscation order is made — *i.e.*, a need to show a risk of dissipation.

Operational Aspects. Approximately half the FATF members have dedicated financial investigation units within the police or other law enforcement agency. These units are responsible for investigating the financial aspects of crime (including money laundering) such as asset identification and tracing with a view to confiscation. In many cases, law enforcement units are able to obtain the person's bank accounts and tax records, as well as publically available information. This type of information is important evidence to help determine a person's legitimate income. The efficiency and speed of necessary financial inquiries of law enforcement personnel depends on how well public records are computerized. The ideal situation is that the investigating agency has on-line computer access to public records such as company or land records.

Problems, Proposed Changes, and Aspects of the System

Several FATF member countries indicated that easing the burden of proof for the prosecutor is an important aspect of a confiscation system, including: (1) proof that the defendant has engaged in prior criminal conduct from which he has profited or obtained certain property; and (2) linkage of proceeds to specific prior criminal activity. Difficulty may not occur in cases where the offense has a readily identifiable victim, but most drug trafficking and other serious offenses have no direct victim who can provide any evidence. Moreover, many such offenses involve

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the defendant being caught committing the crime, so that he has made no profit from the offense, even though he may have been engaged in the criminal activity for many years. The ability to reverse the burden of proof is regarded as a very important element of the systems in Australia, Hong Kong, and the United Kingdom. In addition, Denmark, Germany, Iceland, Luxembourg, Norway, and Sweden all consider the burden of proof to be a problem and some are considering reversing the burden for certain offenses. Recent amendments to the law in Austria and Switzerland allow that the property of criminal organizations be confiscated provided that all of the frozen money on unmeritorious defenses after the defendant pled guilty. Some methods under consideration for controlling the use of frozen money include: (1) to ensure that no other property is available to be used for this purpose; (2) to tax the lawyer's bills; (3) to prevent the use of assets that are the proceeds of crime; and (4) to require defendant's lawyers to be paid at legal aid rates.

Several countries also believe that they had benefited from an organizational structure, where a multi-disciplinary body or close cooperation between the relevant government departments or agencies existed. Canada, Finland, New Zealand, Norway, and Singapore have benefited from such arrangements. Similarly, it is believed that an effective confiscation regime often requires dedicated prosecutors and investigators.

The single most important issue for most countries is the question of the burden of proof upon the government.

one proves that the organization controls the property. It is not necessary to prove the illegal origins of the property.

A number of countries indicated a problem with the payment of legal expenses from frozen money. The difficulty was reconciling the principle of the defendant's legitimate right to be legally represented using his property with the practice whereby the defendant's lawyer had, in some cases, used most or

Conclusion

It has been said that certain criminals and criminal enterprises do not mind convictions or prison sentences provided that they are able to retain their ill-gotten gains. An effective confiscation system, both domestically and internationally, is a very important deterrent to criminal activity, as well as being cost-effective. As shown on pages 10 and 11, there are many confiscation systems with different features. This fact, combined with a lack of statistics and a lack of experience in many countries, makes it difficult to isolate problems, let alone, identify desirable attributes of an ideal system. Two points that should be considered are:

- many forms of profit-making crime, particularly drug trafficking, are engaged in by criminals as a long-term business activity. Confiscating only the proceeds of the crime for which they are actually caught is unlikely to deprive them of a substantial proportion of their illegal profits; and
- for most serious offenses—*i.e.*, drug trafficking, organized crime or complex fraud—it will be difficult, if not impossible, to prove to the normal criminal standard the extent to which a defendant has benefited financially from his criminality.

Most FATF countries have had confiscation laws for many years, but there are a number of additional measures that governments should consider in order to effec-

tively confiscate, seize, and freeze laundered proceeds. First, all members should implement an effective confiscation scheme that extends to a range of serious offenses, not only drug trafficking, especially one that prevents the defense's argument that the property is the proceeds of another form of crime other than drugs. Second, in appropriate cases, members should take action to confiscate the proceeds of a crime—or property of an equivalent value—even if it is in the name of a third party, and countries that require such laws could consider some of the alternative methods previously mentioned. Consideration needs to be given to non-conviction-based confiscation. For the more limited alternative in which confiscation is conviction-based, members should consider laws to freeze and confiscate assets of absconders or fugitives from justice. A defendant who is a fugitive should not also have the benefit of retaining the proceeds of criminal conduct.

Probably the single most important issue for most countries is the question of the burden of proof upon the government and whether it should be eased or reversed. Integrally linked is the question of depriving a defendant of proceeds of offenses other than those for which he is immediately convicted. If the aim of governments is to strip a convicted defendant of all his criminal proceeds, then they should seriously consider measures to make the task easier for the prosecutor. These measures include:

- to apply an easier standard of proof than the normal criminal standard to the confiscation proceedings;
- to reverse the burden of proof and to require the defendant to prove that his assets were legitimately acquired; and
- if a conviction is required for confiscation, to enable the court to confiscate the proceeds of criminal activity other than the crimes of which the defendant is immediately convicted.

Subject to the fundamental principles of each country's domestic law and to the need to preserve the rights of victims, members should consider enacting such measures in relation to serious criminal activities such as drug trafficking or organized crime. Another option, as enacted in France, is to allow the court to confiscate the assets of a person convicted of serious offenses relating to drug trafficking, or, as in Italy, to require the court to order the confiscation of all assets which are disproportionate to the person's legitimate income.

There is generally no particular difficulty with provisional measures, though the issue of release of funds for the defendant's legal expenses does raise serious questions of public policy, and it is questionable whether prosecutors should be required to prove a risk of dissipation. In order to ensure that any confiscation order which is ultimately made can be enforced against available assets, members should be able to freeze or seize all types of property from the earliest stage of the criminal proceedings until they are concluded. With regard to operational issues, an effective confiscation regime will usually require dedicated prosecutors and investigators. Lack of dedicated resources will always mean that there will be more urgent priorities elsewhere, since asset confiscation is often regarded as ancillary to mainstream prosecutions.

Endnotes

[1] Other reports and material on the FATF can be accessed from the Internet at URL address: http://www.oecd.org/fatf/.

[2] The member countries and jurisdictions of the FATF are: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, Ireland, Italy, Japan, Luxembourg, the Kingdom of the Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

[3] The laws and systems are those in place as of March 1, 1997.

[4] *Compare* the European Court of Justice's decision in *Welch v. United Kingdom* (a particular confiscation under the Drug Trafficking Offenses Act 1986 in England and Wales was punishment and a penalty), *with* that of the U.S. Supreme Court in *United States v. Ursery,* 518 U.S. 267 (1997) (the civil forfeiture provisions in the United States are not punishment for double jeopardy purposes).

[5] Some countries may also have standards other than knowledge, *i.e.*, belief, suspicion, etc.

Letters to the Editor . . .

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Characteristics of National Legal Systems for Confiscation

Explanation

- *Year:* The year of enactment of the confiscation legislation or the last major amendment.
- *Drugs or serious crime:* Does the legislation apply only to drugs or to all serious crime?
- *Property or value:* Does the confiscation law principally confiscate items of property (Property) or does it provide that the person pay a sum of money (value) [principal and most used method is in bold type]?
- *Conviction required:* Is a conviction required before confiscation can be sought, or is it possible to confiscate without a conviction (either in a wide or limited range of cases)?
- *Reverse burden of proof:* Is it mandatory or discretionary for the court to reverse the burden of proof so that the defendant or owner of the property to be confiscated must prove that the property (or the alleged benefit from the crime in a value system) is not acquired from crime?
- *Proceeds must be linked to conviction:* Does the confiscation law allow a person to be deprived only of the proceeds of crimes for which he is convicted?
- *Third-party property:* Many countries prosecute an accomplice or associate of the defendant who commits the predicate offense, but criminal defendants are not included as "third parties" in this annex. This column sets out three categories of situations (this is not an exhaustive list) where property which is owned or held by third parties can be confiscated or made subject to the confiscation order.

  (i) gift: property is given to the third party by the defendant for little or no real consideration;

  (ii) knowledge: if the third party knew, believed, suspected, could not ignore, etc. that the property was the proceeds of crime;

  (iii) effective control: the defendant still effectively controlled the property at the time of the confiscation proceedings, whoever the nominee owner is.

Country	Year	Drugs (D) or serious crime (SC)	Property or value confiscation	Conviction required?	Criminal or civil	Reverse burden (or other easier) standard of proof	Proceeds must be linked to conviction?	Third-party Property
Australia (Customs Act								
POCA)	1979	D	**PV**	no	civil	no	no	effect. control
	1987	SC	**PV**	yes	civil	yes	no	effect. control
Austria	1997	SC	**PV**	no	criminal	yes	no	gift
Belgium	1990	SC	**PV**	yes	criminal	no	yes	yes
Canada	1989	SC	**PV**	yes	both possible	no	no	yes
Denmark	1930s	SC	**PV**	yes	criminal	no	yes	all categories
Finland	1994	SC	**PV**	yes	criminal	no	yes	yes
France	unknown	SC	**PV**	yes	criminal	yes (drugs)	no (drugs)	knowledge
Germany	1975	SC	**PV**	no	criminal	no	yes	yes

Country	Year	Drugs (D) or serious crime (SC)	Property or value confiscation	Conviction required?	Criminal or civil	Reverse burden (or other easier) standard of proof	Proceeds must be linked to conviction?	Third-party Property
Greece	1995	SC	PV	no	criminal	yes	no	gift
Hong Kong	1995	SC	PV	yes	civil	yes	no	gift/effect. control
Iceland	1940s	SC	PV	no	criminal	no	yes	knowledge
Ireland	1994	SC	PV	yes, no	civil	yes	no	gift
	1996	SC	P	no	civil	yes	no	yes
Italy	1950	SC	P	yes	criminal	yes	no	effect. control
Japan								
Penal Code	1908	SC	PV	yes	criminal	no	yes	knowledge
Anti-Drug Law	1992	D	PV	yes	criminal	yes	yes	knowledge
Luxembourg	1989	SC	PV	no	criminal	no	yes	yes
Netherlands	1983	SC	PV	yes	other	no	no	yes
Neths. Antilles	1983	SC	PV	yes	criminal	no	yes	yes
Aruba	1993	SC	PV	yes	criminal	no	no	yes
New Zealand	1992	SC	PV	yes	civil	yes	yes	effect. control
Norway	1985	SC	PV	no	criminal, civil	no	yes	gift/knowledge
Portugal	1995	SC	PV	yes	criminal	no	yes	knowledge
Singapore	1993	D	PV	yes	civil	yes	no	gift/effect. control
Spain	1996	SC	P	yes	criminal	no	yes	yes
Sweden	1940s	SC	PV	yes	criminal	no	yes	yes
Switzerland	1994	SC	PV	no	criminal	yes	no	yes
Turkey	1920s	SC	PV	yes	criminal	no	yes	no
United Kingdom	1995	SC	PV	yes	civil	yes	no	gift
United States								
civil forfeiture	1986	SC	P	no	civil	yes	no	knowledge effect. control
crim. forfeiture	1984	SC	PV	yes	criminal	no	yes	gift/effect. control
Totals:		D: 1 SC: 25	P: 16 V: 6 PV: 4	Yes: 17 No: 7 Both: 2	Criminal: 16 Civil: 6 Both: 3	Yes: 11 No: 13 Both: 2	Yes: 13 No. 12 Both: 1	Yes: 25 No: 1

Congress Holds Hearing on "Colombian Black Market Peso Exchange"

By Dennis Crawford, Director, National Operations Division, Criminal Division, Internal Revenue Service

On October 22, 1997, the House Banking and Finance Subcommittee held a hearing on the Colombian Black Market Peso Exchange (BMPE). The hearing, which was chaired by Representative Spencer Bachus (R-Ala.), examined the role that the BMPE plays in illicit narcotics trafficking and its impact on the economies of both the United States and Colombia. The witnesses appearing before the Subcommittee included: Ms. Doe, a witness testifying under anonymity; Senior Analyst Al James, Criminal Investigation Division, Internal Revenue Service (IRS); Special Agent Gregory Passic, Financial Crimes Enforcement Network (FinCEN); and Assistant Director Allan J. Doody, Investigative Operations, U.S. Customs Service (USCS).

The hearing opened with the testimony of Ms. Doe, an anonymous witness, who told the subcommittee that she had been employed as a Black Market money broker in Colombia for several years. She testified about how she utilized bank accounts under her control in many prominent U.S. and international financial institutions to pass money through their branches for payment of U.S. imports. However, she emphasized that these financial institutions may not have been aware of her money laundering activities. The witness proceeded to disclose that she had arranged payments to many large U.S. and international companies on behalf of Colombian importers seeking to avoid Colombian taxes and tariffs of up to 20 percent. These companies were paid with U.S. currency generated from illegal narcotics trafficking.

The GTO has had a devastating effect on the ability of the cartels to launder their drug profits through money remitters.

The witness provided the following example of how the BMPE works:

> A coffee grower in Colombia needs to purchase a tractor from a United States tractor maker. He purchases the tractor for $500,000 U.S. dollars. He receives the tractor in Colombia, but only has Colombian pesos to pay. He needs to pay the U.S. company in dollars. The coffee grower takes the pesos to a black market money broker instead of using Colombian banks, because he can purchase dollars from the broker, and the broker charges him a commission for the service that is far less than the Colombian taxes and tariffs that would be paid in a legitimate transaction. The broker then approaches a financial representative for a drug cartel who has $500,000 in U.S. drug dollars sitting in stash houses in the United States. The broker arranges to purchase the pesos received from the farmer, minus a commission. The broker then arranges the delivery of the U.S. dollars to the tractor maker in the United States on behalf of the coffee farmer. In this manner, the farmer's debt is paid to the U.S. company, the drug dealer's money has been laundered and the broker has received a commission from both parties.

The witness also testified about the sale of exports, the establishment of U.S. checking accounts and money remitters, and the use of blank checks. She concluded by endorsing the Treasury-led Geographical Targeting Order (GTO), which was imposed on New York's Colombian money remitters. In her opinion, the GTO has had a devastating effect on the ability of the cartels to launder their drug profits through money remitters.

Senior Analyst Al Jones, Criminal Investigation Division, IRS, testified as to what law enforcement agencies have learned about the BMPE. His presentation led the committee through the fundamental details of the operation of the Colombian BMPE. It showed how dollars derived from illicit drug sales were returned to Colombia in the form of imported goods.

Special Agent Gregory Passic,

*See **Peso**, page 15*

Postal Service Implements BSA Compliance Program

By Al Gillum, Postal Inspector, U.S. Postal Inspection Service

The U.S. Postal Service (USPS) has begun implementing a comprehensive Bank Secrecy Act (BSA) Compliance and Anti-money Laundering Program. The program's elements include: (1) the new standardized USPS BSA forms for employees to complete; (2) a national BSA training program for all retail employees who sell money orders, wire transfers, and stored value cards; (3) a systems analysis to monitor postal employee compliance with BSA reporting/recording requirements; and (4) an analysis of sales and cashing patterns of money orders, wire transfers, and stored value cards in order to identify abuses by the criminal element.

Standardized BSA Forms

The USPS implemented two new BSA forms: Form 8105-A, Funds Transaction/Transfer Report, and Form 8105-B, Suspicious Transaction Report. The Form 8105-A — commonly referred to in the industry as the "$3,000 log" — replaced the PS Form 8105, Money Order Transaction Report, and is used for the sale of money orders, wire transfers, and stored value cards totaling $3,000 or more in any combination to the same customer in the same day. The Form 8105-B is completed by postal employees when they believe transactions are suspicious, regardless of the dollar amount of the transaction. Retail employees send the completed forms to the Postal Accounting Service in St. Louis, Missouri, where they are entered into a database for analysis and retrieval.

National BSA Training

All retail employees are required to view a BSA training video, which explains BSA reporting and recording requirements and postal employees' responsibilities to comply with the law. The USPS took a pro-active approach in the training by establishing policies and procedures for employees to report suspicious transactions, even though the regulations that require reporting by money services businesses have not been published. The training video includes eight scenarios where professional actors portray postal customers purchasing money orders in a suspicious manner.

The training video includes scenarios where actors portray postal customers purchasing money orders in a suspicious manner.

The USPS initiated the training requirements in April 1997, and approximately one half of the nearly 300,000 retail employees have attended the training to date. Within months of the inauguration of the national training, the number of PS Forms 8105-A completed by employees doubled. Most of the retail employees completed the training in March 1998. The BSA training is also included in the standard training modules for all newly assigned retail employees.

BSA Compliance Monitoring System

Postal money order sales activity is analyzed to identify transactions where it appears that PS Forms 8105-A should have been completed; that is, transactions where it appears that the same individual purchased $3,000 or more in money orders from the same clerk in the same day. Serial numbers in these transactions are then matched with serial numbers for which Forms 8105-A were completed. Noncompliance letters are generated for all money orders for which there is no match. The noncompliance letters are sent to the postmaster or manager of the office where the noncompliance occurred instructing the manager to take appropriate corrective action. If recurring noncompliance is detected at the same office, a report is sent to the BSA compliance officer and to USPS inspector general for any action they deem appropriate.

*See **Compliance**, page 14*

Postal Service Implements BSA Compliance Program

Compliance, from page 13

Analysis to Detect Abuse

Computer analysis of postal money order, wire transfer, and stored value card activity is performed to detect abuse by the criminal element. The analysis includes a detailed scrutiny of sales and cashing patterns to identify individuals or groups of individuals who may be using the products in money laundering activities. The analysis is performed jointly by USPS and the U.S. Postal Inspection Service. Results from the analysis are used by USPS to report suspicious activity as required by the BSA and by USPS to investigate money laundering activity involving the use of postal products.

The USPS's BSA Compliance and Anti-money Laundering Program is one of the most comprehensive in the industry. The BSA system contains invaluable information regarding the sale and cashing of postal money orders, wire transfers, and stored value cards believed to be involved in suspicious activity. The Department of Justice and law enforcement officials are encouraged to call Postal Inspector Al Gillum, at (202) 268-5476, for further information about the system.

FBI Expands Anti-money Laundering Mission

By Philip Hudanish, Analyst, Federal Bureau of Investigation

The Federal Bureau of Investigation (FBI) recognizes the importance of money laundering as a nexus between many criminal activities and is therefore fine-tuning its focus in the area, as well as increasing the number of agents and analysts assigned to combat it.

Traditionally, the FBI has investigated money laundering activity merely as an adjunct to the underlying criminal offense. Now the focus has expanded, specified unlawful activities (SUAs) are being added and proven as the investigation proceeds—not unlike metal filings being drawn to a magnet. Investigations not initially opened because of money laundering activities but later revealing money laundering are receiving a higher degree of attention from the FBI's financial investigators as well.

The use of the artificial intelligence database developed by FinCEN and the Numerically Integrated Profiling System devised by the U.S. Customs Service make actively seeking out money laundering cases much easier. An increase in the FBI's headquarters personnel dedicated to money laundering investigations will make interaction with these agencies feasible.

As of October 1, 1997, the Economic Crimes Unit at FBI Headquarters has been given program management responsibility for money laundering investigations. Recent personnel changes affecting that unit include the following:

John R. Kingston is the new Chief of the Economic Crimes Unit. Stepping up from his role as the supervisor responsible for money laundering matters keeps him on top of money laundering issues and allows him to pass on his years of experience. Mr. Kingston has a law degree and has spent much of his twelve years in the FBI working on white-collar crime matters.

Supervisory Special Agent Thomas J. Browne has assumed Mr. Kingston's previous position and is pursuing new avenues for money laundering investigations.

Analyst Philip J. Hudanish recently joined the unit in order to help better coordinate analytical efforts. His background is in international business. In addition, he is fluent in Russian and German and has traveled extensively overseas.

The unit is also looking forward to filling two more recently authorized supervisory special agent positions in the upcoming months, thereby bringing the total anti-money laundering complement of the unit up to four investigators or analysts.

Colombian Black Market Peso Exchange

***Peso**, from page 12*

FinCEN, testified on the operation of the FinCEN-based Interagency Coordination Group (ICG). Through the use of partnership meetings, the ICG seeks to educate the law enforcement community while seeking to systematically attack the Black Market phenomenon. Through these partnership meetings, the ICG works closely with the Colombian import community to identify errant importers looking to employ this system to undermine the legitimate import market.

Assistant Director Allan Doody, Investigative Operations, USCS, concluded the joint statement by highlighting law enforcement's discovery of the BMPE and the historic efforts utilized by the law enforcement community to combat this system. He testified that law enforcement agencies became aware of these Black Market Peso Exchangers in the early 1980s, through its investigations of Isaac Kattan, Bheno Ghitis, and others. Doody explained that, as legislative and law enforcement efforts have become more and more successful, the Black market exchangers have had to change the way they do business.

Notable Cases

By Lester M. Joseph, Assistant Chief, AFMLS, Criminal Division

Bank Secrecy Act/ Safe Harbor Provision

- Safe harbor provision of 31 U.S.C. § 5318 does not automatically apply to all disclosures of information by banks to law enforcement.

In an important case addressing the scope of the "safe harbor" provision of the Bank Secrecy Act (BSA) found in 31 U.S.C. § 5318(g)(3), the Eleventh Circuit reversed the dismissals of the district court in two consolidated cases, holding that the safe harbor provision did not automatically apply to all disclosures of information by banks to law enforcement. Rather, in order to invoke section 5318 as a defense in a civil suit against a bank for making a disclosure of account information to law enforcement, a bank must show that the disclosure was made within the parameters of section 5318(g)(3) and that there was a good faith basis for believing that there is a nexus between the suspicion of illegal activity and the account or accounts from which the information is disclosed.

Lopez v. First Union National Bank of Florida was a consolidation of two private civil actions against banks, alleging that the banks improperly disclosed electronically-held bank information concerning them to federal authorities. In *Lopez*, on two occasions in 1993, when Lopez received wire transfers into his account, First Union provided law enforcement authorities with access to the contents of these transfers based *solely* on the verbal instructions of federal law enforcement agents. Further disclosures were made in 1994 pursuant to a seizure warrant.

In June 1995, First Union surrendered the $270,887 balance of Lopez' First Union account to the United States. A civil forfeiture case filed against Lopez was resolved by a stipulation that $108,359 was forfeited and $162,532 was returned to her.

Following the resolution of the civil forfeiture case, Lopez filed suit against First Union asserting claims under the Electronic Communications Privacy Act (ECPA), the Right to Financial Privacy Act (RFPA), and Florida law. First Union moved to dismiss the complaint for failure to state a claim. The district court granted the motion and dismissed Lopez' complaint with prejudice, based on the conclusion that the Annunzio-Wylie Anti-Money Laundering Act immunized First Union from liability.

The Eleventh Circuit first concluded that Lopez did state legally sufficient claims under the ECPA (18 U.S.C. § 2703(a)) and the RFPA. The court then proceeded to examine whether First

*See **Cases**, page 16*

Notable Cases

Cases, from page 15

Union's disclosures were protected by the *safe harbor* provision of 31 U.S.C. § 5318(g)(3), which provides immunity to financial institutions for three different types of disclosures:

(1) a disclosure of any possible violation of law or regulation;

(2) a disclosure pursuant to section 5318; or

(3) a disclosure pursuant to any other authority.

The court examined each of the three safe harbor provisions of section 5318 to see if they applied to the disclosures made. The court ruled that the disclosures made pursuant to the *verbal requests* did not fit within any of the three categories:

(1) The court rejected First Union's contention that the first safe harbor protects disclosures made in response to nothing more than verbal instructions of government officials.

(2) Since First Union made its disclosures in 1993 and 1994 and the SAR reporting regulations under section 5318 were not issued until 1996, the disclosures could not have been pursuant to section 5318.

(3) The court found that the third part of the safe harbor provision (a disclosure pursuant to any other authority) did provide immunity for the disclosure pursuant to the seizure warrant, but *did not* cover the disclosures pursuant to the verbal request of law enforcement.

Thus, First Union's disclosures in response to the verbal instructions of law enforcement were *not* protected by section 5318's safe harbor. Only the disclosure pursuant to the seizure warrant was protected. Thus, the district court erred in granting the motion to dismiss.

In *Coronado v. BankAtlantic Bancorp, Inc.*, BankAtlantic (BA) notified federal agents concerning the "unusual amounts" and "unusual movements" of money at the bank in June 1995. Thereafter, BA provided federal agents access to the contents of financial information in the accounts. Federal agents subsequently seized 1100 accounts upon allegations of money laundering. Later, the agents released 400-600 of the accounts because they had no connection to money laundering. Coronado, on behalf of himself and the other account holders, filed a class action suit against the bank asserting claims under the ECPA, the RFPA, and Florida law.

The district court granted the bank's motion to dismiss with prejudice based on its conclusion that section 5318 immunized BA from liability.

In the Eleventh Circuit, the bank argued that its disclosures were protected by section 5318 because it suspected a violation of law based on its detections of "unusual amounts" and "unusual movements" of money in the bank.

The Eleventh Circuit, however, noting that it was ruling on a motion for summary judgment, held that the bank's allegations that it detected suspicious activity could mean that it detected suspicious activity in only one account or a few accounts — but not that it had a good faith basis to suspect violations of law in all 1100 accounts. The court stated that, in order for section 5318 to protect disclosures, "there must be some *good faith basis for believing* there is a *nexus* between the suspicion of legal activity and the *account or accounts* from which information is disclosed." Otherwise, the court noted, "a bank would have free license to disclose information from any and every account in the entire bank once it

Just A Reminder...

Please send AFMLS:

A copy of any money laundering indictment charging a violation of 18 U.S.C. § 1956 or 1957. Include with the indictment:

- case number and date of return
- date the indictment was unsealed

AFMLS/CRM/DOJ
1400 New York Avenue, N.W.
Bond Building, Tenth Floor
Washington, D.C. 20005

Required by
***United States Attorneys' Manual* § 9-105**

suspected illegal activity in any account in the bank." In this case, the court held that the allegations in the complaint, taken in the light most favorable to Coronado, did not show that BA determined in good faith that there was any nexus between the suspicious activity it detected and the information it disclosed from more than a thousand accounts.

Thus, the bank's disclosures, as described in the complaint read in the light most favorable to Coronado, were not protected by section 5318 and the district court's dismissal of the complaint was improper.

Lopez v. First Union Bank, 129 F.3d 1186 (11th Cir. 1997).

Comment: While these two cases involved disclosures to law enforcement prior to April 1996, when the new suspicious activity reporting regime went into effect, the interpretations discussed in these cases is applicable to suspicious transactions reported pursuant to 31 U.S.C. § 5318(g)(1). The banking community is watching the development of the law in this area very closely, and it can be expected that banks will tailor the scope of their cooperation with law enforcement to ensure that information provided is within the protection of section 5318. John Byrne, Senior Counsel and Compliance Manager for the American Bankers Association, stated in an article in the January 1998 edition of the *Money Laundering Law Report* that "[u]ntil law in this area becomes more settled, after *Lopez*, caution dictates that all financial institutions should have written policies on government requests for information and should never allow an employee to provide information based on an oral inquiry." Since it is in the interest of the Federal Government to support the broadest possible application of the safe harbor provision, we should work with the financial community to promote practices that will ensure that information provided by financial institutions is protected by section 5318(g).

Money Laundering/ Financial Transaction

- Presence of large amounts of currency in a residence is not sufficient to support a money laundering violation.

Defendants Garza and Garcia were arrested for drug trafficking. Approximately $5 million in cash was recovered during the search of the home of a co-conspirator. Garza and Garcia were convicted of conspiracy to violate 18 U.S.C. § 1956(a)(1)(A)(i) based on the storage of the currency at this location. The Fifth Circuit reversed this conviction finding that the Government failed to present evidence of a "financial transaction" involving these defendants. The Government argued that the evidence, which demonstrated the collection of more than $11 million of drug proceeds in less than six weeks and the presence of $5 million of proceeds in the home, supported an inference of a disposition of the drug proceeds. However, the court found that, "[n]otwithstanding this inference-filled expose, currency found by officers in connection with a drug trafficking offense, by itself, is insufficient evidence to support a money laundering conviction."

United States v. Garza, 118 F.3d 278 (5th Cir. 1997).

Money Laundering/ Inconsistent Verdicts

- Acquittal on underlying offense does not require reversal of money laundering counts.

Defendants Rochelle and Victor Whatley were indicted on one count of conspiracy to commit wire fraud and 106 counts of wire fraud. In addition, Mrs. Whatley was indicted on six counts of money laundering in violation of 18 U.S.C. § 1957. A jury convicted the Whatleys of conspiracy but acquitted them on all 106 counts of wire fraud. Mrs. Whately was convicted of five of the six money laundering counts. The Whatleys maintained that, because the jury acquitted them on all of the underlying wire fraud counts, the conspiracy conviction could not stand. The Eighth Circuit rejected that argument, holding that conspiracy is a separate crime in itself and is punishable whether it succeeds or fails.

Mrs. Whatley argued that she could not be convicted of the section 1957 counts since she was not convicted of the underlying offense by which she allegedly obtained the money. However, the court held that the fact that the jury did not convict her on the relevant underlying wire fraud charges did not undermine the money laundering convictions. Noting that inconsistent verdicts are not, on their own, sufficient grounds for reversal or a new trial, the count held that the only relevant questions when reconciling inconsistent

See ***Cases****, page 18*

Notable Cases

Cases, from page 17

verdicts is whether there was enough evidence presented to support the conviction. In this case, the court found that the evidence supporting the money laundering convictions was sufficient and therefore affirmed the convictions on the section 1957 counts.

United States v. Whatley, 133 F.3d 601 (8th Cir. 1998).

Money Laundering/ Duplicity

- District court holds that charging multiple financial transactions in a single count is not duplicitous.

The defendants in this case were convicted of multiple counts of mail fraud, income tax violations, and money laundering in connection with a fraudulent scheme to sell memberships in their "Who's Who" registries. The single money laundering count charged one defendant with knowingly conducting "financial transactions, to wit, the purchase, improvement, furnishing, and maintenance of the Manhasset Condominiums" between December 1, 1992, and the date of the indictment (March 19, 1997) under 18 U.S.C. § 1956(a)(1)(A)(ii) and (B)(i).

In a pretrial motion, the defendant moved to dismiss the money laundering count on the ground that the count improperly charged multiple financial transactions in a single count (citing *United States v. Conley*, 826 F. Supp. 1536 (W.D. Penn. 1993) (holding that the unit of prosecution in a money laundering case is limited to a single financial transaction). The district court stated that the Second Circuit had not yet addressed whether charging multiple transactions in one money laundering count is duplicitous, but that under Second Circuit law, "acts that could be charged as separate counts of an indictment may instead be charged in a single count if those acts could be characterized as part of a single continuing scheme."

In this case, the district court found that the acts alleged in the money laundering count constituted part of a single continuous scheme to use corporate funds to purchase, furnish and maintain the condominium for his benefit without revealing to the IRS that he had control over the money. Therefore, the charge was not duplicitous. The court proceeded to state that the policy considerations underlying the doctrine of duplicity were not implicated in this case because, by grouping several offenses in each count, the indictment served not to expand the defendant's exposure, but to limit it. Further, since the defendant had ample access to the Government's theory of the case, he could not claim that he lacked notice of the charges against him or that it would be difficult for him to ascertain the scope of double jeopardy protection. Finally, the court found that any problems that may be created by multiple transactions in the count could be cured by appropriate instructions to the jury. Therefore, the motion to dismiss the money laundering count was denied.

United States v. Gordon, 990 F. Supp. 171 (E.D.N.Y. 1998).

Comment: While prosecutors in the Eastern and Southern Districts of New York have advised us that judges in those districts prefer that multiple money laundering transactions be charged in a single count rather than in multiple counts, the only reported circuit court case on this issue is *United States v. Prescott*, 42 F.3d 1165 (8th Cir. 1994), which held that charging multiple financial transactions as a continuing course of conduct in a single count is duplicitous. Therefore, unless judges in a district have indicated otherwise, the Asset Forfeiture and Money Laundering Section continues to recommend that each financial transaction be charged in a separate count. However, in order to remedy the problem of having to charge numerous money laundering counts in an indictment (which might be necessary in some cases for the purpose of forfeiture), the Department has included in its proposed "Money Laundering Act of 1998," which was sent to Congress in March 1998, that a new subsection be added to section 1956, which would provide that:

> [a]ny person who commits multiple violations of this section or section 1957 that are part of the same scheme or

> continuing course of conduct may be charged, at the election of the [G]overnment, in a single count in an indictment or information.

See section 16 of Justice's proposed "Money Laundering Act of 1998," which is reprinted on pages 26-27.

Multi-object Conspiracy/ Inconsistent Verdicts/ Sentencing Guidelines

- A conviction for a multi-object conspiracy will stand even if the evidence is insufficient to support a conviction for the substantive offense also pled as one of the objects of the conspiracy.

- Where a defendant is convicted of a multi-object conspiracy without a special verdict, the court can sentence the defendant on the money laundering object if the court determines beyond a reasonable doubt that the defendant conspired to commit that object.

- In a multi-object conspiracy case, where the court fails to make an explicit finding that the defendant conspired to commit the offense of money laundering, the sentence must be vacated for appropriate factual findings.

Two defendants were found guilty by a jury of wire fraud, interstate transportation of property taken by fraud (ITSP), and a multi-object conspiracy to commit mail fraud, wire fraud, ITSP and money laundering. They were acquitted by the jury of a substantive money laundering count. On appeal, the defendants challenged, *inter alia*, the sufficiency of the evidence supporting the conspiracy count and their sentencing under the sentencing guidelines for money laundering. With respect to the sufficiency of the evidence to support a judgment of conviction for conspiring to commit the offense of money laundering, the Eleventh Circuit held that it need not consider that issue because, under *Griffin v. United States*, 502 U.S. 46 (1991), a guilty verdict in a multi-object conspiracy will be upheld if the evidence is sufficient to support a conviction of any of the alleged objects.

With respect to the sentencing issue, the defendants argued that the district court erred in applying the money laundering guidelines in view of the fact that the jury found them not guilty of the substantive money laundering count. The appellate court rejected this argument, noting that it failed to recognize the distinction between the existence of proof necessary to demonstrate a conspiracy to commit a criminal act, such as money laundering, and the evidence that must be produced to sustain a conviction for the substantive offense of money laundering. The fact that the defendants were acquitted of the substantive money laundering count does not mean that the money laundering object of the conspiracy was not established. Since the defendants did not request a special verdict on the objects of the conspiracy, the court had "no way of determining whether the jury was unanimously persuaded beyond a reasonable doubt that Ross and Adams conspired to commit money laundering."

The court observed that in cases of multi-object conspiracies where there is no special verdict, section 1B1.2(d) of the U.S. Sentencing Guidelines provides:

> A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant has been convicted on a separate count of conspiracy for each offense the defendant conspired to commit.

Application Note Five to section 1B1.2(d) states that, in cases where the verdict does not establish which offenses were the object of the conspiracy, subsection (d) should only be applied with respect to an object offense if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit the object offense. Under Eleventh Circuit law, the court must find beyond a reasonable doubt that the defendant conspired to commit the particular object offense. In this case, the appellate court held that the district court did not make an express finding that the defendants conspired to commit the offense of money laundering beyond a reasonable doubt. Therefore, the sentencing decision was vacated and remanded for appropriate factual findings.

United States v. Ross, 131 F.3d 970 (11th Cir. 1997).

See ***Cases****, page 20*

Notable Cases

Cases, from page 19

Money Laundering/ Multi-object Conspiracy

- A conviction for participation in a drug conspiracy can be sustained where the defendant's only involvement was to assist in laundering the drug proceeds.

- In a multi-object conspiracy, where one of the two objects is insufficient as a matter of law and it is impossible to tell which object the jury selected, the conspiracy conviction must be reversed.

Two defendants owned and operated a commercial and residential real estate business in Georgia; the third defendant was an automobile broker. In December 1992, all three defendants were indicted, along with a number of other coconspirators, in a complex drug conspiracy. They were also charged in another count with engaging in a multiple-object conspiracy to launder drug proceeds (in violation of 18 U.S.C. 1956), to structure currency transactions and to defraud the government under 18 U.S.C. 371. Upon conviction, the defendants challenged their convictions for the drug conspiracy on the basis that they never possessed drugs and did not participate in the drug conspiracy, but only assisted the cocaine wholesalers to acquire property and automobiles. The court quickly rejected this argument, holding that the Eleventh Circuit had previously held that a defendant involved only in the money laundering facet of the drug business could be considered a part of the conspiracy to distribute those drugs (*citing United States v. Bollinger*, 796 F.2d 1394 (11th Cir. 1986), *modified on other grounds*, 837 F.2d 436 (11th Cir.), *cert. denied*, 486 U.S. 1009 (1988).

With respect to the second conspiracy conviction, the Government conceded that the jury instruction on the structuring object of the conspiracy (31 U.S.C. § 5324) was improper as a result of the Supreme Court's decision in *Ratzlaf v. United States*, 510 U.S. 135 (1994), which was decided during the pendency of this case. The defendants argued that their conviction on this conspiracy count must therefore be reversed because the structuring instruction was incorrect as a matter of law. In this case, the Eleventh Circuit agreed, again citing *Griffin v. United States*, 502 U.S. 46 (1991). The court stated that, where one of two objects of a conspiracy charge is insufficient as a matter of law, "the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." While it is true, the court noted, that the jury might have agreed unanimously to convict the appellants of conspiring to commit another offense, *e.g.*, money laundering, that possibility alone is insufficient to justify an affirmance. Therefore, the section 371 conspiracy was reversed and the case remanded.

United States v. High, 117 F.3d 464 (11th Cir. 1997).

Comment: This case was indicted very shortly after 1956(g) (now section 1956(h)) was enacted in October 1992, so charging this case under the 1956 conspiracy provision was probably not an option. However, now that section 1956(h) is available, AFMLS recommends that money laundering conspiracies be charged under that section. While this may necessitate charging two or more conspiracies in an indictment, charging money laundering conspiracies under section 1956(h) avoids the problems which can arise when money laundering is charged as one object of a multi-object conspiracy under section 371.

Money Laundering/Merger

- Money laundering conviction reversed because check writing scheme generated no proceeds which could be laundered.

Defendant Maulden, a member of the board of directors of Bay Bank, entered into a scheme with defendant Christo, the bank president, whereby Maulden's NSF

See Cases, page 28

Justice Submits Money Laundering Bill to Congress

By Stefan D. Cassella, Assistant Chief, AFMLS, Criminal Division

On March 3, 1998, the Department of Justice sent to Congress a proposed Money Laundering Act of 1998, which is set forth below. Subsequently, two versions of the Money Laundering Act of 1998 were introduced in the House and Senate. The Senate bill, S. 2011, was introduced on April 30, 1998, by Sen. Patrick Leahy (D-Vt.) and other Democrats. It is identical to the Department of Justice's proposal except that it omits sections 4, 10, 12, and 17.

The House version, H.R. 3745, was introduced by Reps. Bill McCollum (R-Fla.) and Charles Schumer (D-N.Y.) on April 29, 1998. It also omits sections 4, 10, 12, 17, as well as section 14. The House bill, however, contains an important provision limiting innocent owner defenses that may be asserted in cases involving the Black Market Peso Exchange. *See* story, p. 12. The proposed legislation and accompanying letter to the Speaker of the House are reprinted below. The section-by-section analysis of the House bill is available from the Asset Forfeiture and Money Laundering Section. To obtain a copy, contact the editor at (202) 514-1263.

March 3, 1998

The Honorable Newt Gingrich
Speaker
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Enclosed herewith is a draft bill, the "Money Laundering Act of 1998," which contains legislative proposals to enhance federal law enforcement's ability to combat illegal money laundering.

Most of the provisions in the bill are designed to address the international laundering of criminal proceeds, either by criminals who commit crimes abroad and launder them in the United States, or by those who commit offenses in this country and then seek to conceal their ill-gotten gains abroad.

For example, the bill would expand the list of "specified unlawful activities" which constitute the predicate offenses for money laundering to include an array of foreign crimes, including crimes of violence, terrorism, fraud and corruption, thus making it possible to prosecute a person who commits such crimes in another country and attempts to launder the proceeds through our domestic institutions. Likewise, the bill would make it possible to restrain the assets in the United States of a person arrested abroad, and to restrain the domestic assets of a foreign bank that is engaged in money laundering in violation of U.S. law.

The bill would also codify the fugitive disentitlement doctrine to bar a fugitive from contesting the forfeiture of his property while remaining outside the reach of federal law enforcement. This tool could be used with great effectiveness against foreign criminals who launder their money in the United States but remain safely overseas, resisting extradition.

With regard to the assets of domestic criminals who seek to take advantage of their ability to move money abroad, screened by the secrecy laws of foreign jurisdictions, the bill would extend the money laundering statutes to reach transactions involving foreign banks and enhance federal prosecutors' access to foreign bank records and make them admissible in federal courts. It would also create certain evidentiary presumptions that would apply if money is moved from a drug producing or transit country, through a bank secrecy jurisdiction, in the name of a shell corporation, to an account in the United States.

See ***Bill****, page 22*

Justice Submits Money Laundering Bill

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Finally the bill would strengthen our domestic money laundering laws in a number of ways, such as by making it clear that a transaction involves criminal proceeds even if such proceeds have been commingled with other funds, and by allowing prosecutors to file money laundering charges in the district where the underlying criminal offense is being prosecuted.

The Omnibus Budget Reconciliation Act (OBRA) requires that all revenue and direct spending legislation meet a pay-as-you-go requirement. That is, no bill should result in an increase in the deficit; and if it does, it will trigger a sequester if it is not fully offset. The Money Laundering Act would result in increased deposits into the Justice and Treasury Forfeiture Funds, which would be offset by direct spending from those funds and result in a net zero paygo effect. Therefore, considered alone, this bill meets the pay-as-you-go requirement of OBRA.

With respect to potential impacts on the criminal justice system, the bill does not impose any new penalties involving incarceration, nor does it create any new offenses for which incarceration may be imposed.

It would be appreciated if you would lay this draft bill before the House of Representatives. An identical proposal has been transmitted to the President of the Senate.

The Office of Management and Budget has advised that there is no objection to the presentation of this proposal to the Congress from the standpoint of the Administration's program.

Sincerely,
/signed/
Andrew Fois
Assistant Attorney General

Proposed Money Laundering Act of 1998

A BILL

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled,

SEC. 1. SHORT TITLE.

This Act may be cited as the Money Laundering Act of 1998.

SEC. 2. TABLE OF CONTENTS.

* * *

SEC. 3. ILLEGAL MONEY TRANSMITTING BUSINESSES.

(a) CIVIL FORFEITURE FOR MONEY TRANSMITTING VIOLATION.— Section 981(a)(1)(A) of [T]itle 18, United States Code, is amended by striking "or 1957" and inserting ", 1957 or 1960."

(b) SCIENTER REQUIREMENT FOR SECTION 1960 VIOLATION.— Section 1960 of [T]itle 18, United States Code, is amended by adding the following new subsection:

"(c) For the purposes of proving a violation of this [s]ection involving an illegal money transmitting business as defined in subsection (b)(1)(A), it shall be sufficient for the [G]overnment to prove that the defendant knew that the money transmitting business lacked a license required by state law. It shall not be necessary to show that the defendant knew that the operation of such a business without the required license was an offense punishable as a felony or misdemeanor under state law."

SEC. 4. REBUTTABLE PRESUMPTIONS IN INTERNATIONAL MONEY LAUNDERING CASES.

(a) IN GENERAL.— Section 981 of [T]itle 18, United States Code, is amended by adding the following new subsection:

"(k) Rebuttable presumptions. (1) At the trial of an action brought pursuant to subsection (a)(1)(B), there is a presumption, governed by Rule 301 of the Federal Rules of Evidence, that the property is subject to forfeiture if the United

States establishes, by a preponderance of the evidence, that such property was acquired during a period of time when the person who acquired the property was engaged in an offense against a foreign nation described in subsection (a)(1)(B) or within a reasonable time after such period, and there was no likely source for such property other than such offense.

"(2) At the trial of an action brought pursuant to subsection (a)(1)(A), there is a presumption, governed by Rule 301 of the Federal Rules of Evidence, that the property was involved in a violation of [s]ection 1956 or 1957 of this title if the United States establishes, by a preponderance of the evidence, any 3 of the following factors:

"(A) the property constitutes or is traceable to more than $10,000 that has been or was intended to be transported, transmitted or transferred to or from a major drug-transit country, a major illicit drug producing country, or a major money laundering country, as those terms are determined pursuant to [s]ections 481(e) and 490(h) of the Foreign Assistance Act of 1961 (22 U.S.C. §§ 2291(e) and 2291j(h));

"(B) the transaction giving rise to the forfeiture occurred in part in a foreign country whose bank secrecy laws have rendered the United States unable to obtain records relating to the transaction by judicial process, treaty or executive agreement;

"(C) a person more than minimally involved in the transaction giving rise to the forfeiture action (i) has been convicted in any [s]tate, [f]ederal, or foreign jurisdiction of a felony involving money laundering or the manufacture, importation, sale or distribution of a controlled substance, or (ii) is a fugitive from prosecution for such offense; or

"(D) the transaction giving rise to the forfeiture action was conducted by, to or through a shell corporation not engaged in any legitimate business activity in the United States.

"(3) For the purposes of this paragraph, 'shell corporation' means any corporation that does not conduct any ongoing and significant commercial or manufacturing business or any other form of commercial operation.

"(4) The enumeration of presumptions in this subsection shall not preclude the development of other judicially created presumptions."

(b) CRIMINAL FORFEITURE.— Section 982(b) of [T]itle 18, United States Code, is amended by adding the following after paragraph (2):

"(3) The rebuttable presumptions set forth in [s]ection 981 shall apply to forfeitures under this [s]ection."

SEC. 5. RESTRAINT OF ASSETS OF PERSON ARRESTED ABROAD.

Section 981(b) of [T]itle 18, United States Code, is amended by adding the following new paragraph:

"(3) If any person is arrested or charged in a foreign country in connection with an offense that would give rise to the forfeiture of property in the United States under this [s]ection or under the Controlled Substances Act, the Attorney General may apply to any federal judge or magistrate judge in the district where the property is located for an *ex parte* order restraining the property subject to forfeiture for not more than 30 days, except that the time may be extended for good cause shown at a hearing conducted in the manner provided in Rule 43(e), Federal Rules of Civil Procedure. The application for the restraining order shall set forth the nature and circumstances of the foreign charges and the basis for belief that the person arrested or charged has property in the United States that would be subject to forfeiture, and shall contain a statement that the restraining order is needed to preserve the availability of property for such time as is necessary to receive evidence from the foreign country or elsewhere in support of probable cause for the seizure of the property under this subsection."

SEC. 6. ACCESS TO RECORDS IN BANK SECRECY JURISDICTIONS.

Section 986 of [T]itle 18, United States Code, is amended by adding the following new subsection:

"Access to records located abroad

"(d) In any civil forfeiture case, or in any ancillary proceeding in any criminal forfeiture case governed by [s]ection 413(n) of the Controlled Substances Act (21 U.S.C. §853(n)), where —

"(1) financial records located in a foreign country may be material (A) to any claim or to the ability of the [G]overnment to respond to such claim, or (B) in a civil forfeiture case, to the [G]overnment's ability to establish the forfeitability of the property; and

"(2) it is within the capacity of the claimant to waive his or her rights under such secrecy laws, or to obtain the records him- or herself, so that the records can be made available, the refusal of the claimant to provide the records in response to a discovery request or take the action necessary otherwise to make the records available shall result in the dismissal of the claim with prejudice. This subsection shall not

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affect the claimant's rights to refuse production on the basis of any privilege guaranteed by the Constitution or federal laws of the United States."

SEC. 7. CIVIL MONEY LAUNDERING JURISDICTION.

Section 1956(b) of [T]itle 18, United States Code, is amended —

(1) by redesignating the present matter as paragraph (1), and the present paragraphs (1) and (2) as sub-paragraphs (A) and (B), respectively; and

(2) by inserting the following new paragraphs:

"(2) For purposes of adjudicating an action filed or enforcing a penalty ordered under this [s]ection, the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country, that commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States, *provided* that service of process upon such foreign person is made under the Federal Rules of Civil Procedure or the laws of the country where the foreign person is found."

"(3) The court may issue a pre-trial restraining order or take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment under this [s]ection."

SEC. 8. LAUNDERING MONEY THROUGH A FOREIGN BANK.

Section 1956(c)(6) of [T]itle 18, United States Code, is amended to read as follows:

"(6) the term "financial institution" includes any financial institution described in [s]ection 5312(a)(2) of [T]itle 31, United States Code, or the regulations promulgated thereunder, as well as any foreign bank, as defined in paragraph (7) of [s]ection 1(b) of the International Banking Act of 1978 (12 U.S.C. §3101(7))."

SEC. 9. SPECIFIED UNLAWFUL ACTIVITY FOR MONEY LAUNDERING.

(a) IN GENERAL.— Section 1956(c)(7) of [T]itle 18, United States Code, is amended —

(1) in subparagraph (B),

(A) by striking all of the language in clause (ii) and inserting "any act or acts constituting a crime of violence";

(B) by adding after clause (iii) new clauses (iv) through (vii) as follows:

"(iv) fraud, or any scheme to defraud, committed against a foreign government or foreign governmental entity;

"(v) bribery of a public official, or the misappropriation, theft or embezzlement of public funds by or for the benefit of a public official;

"(vi) smuggling or export control violations involving munitions listed in the United States Munitions List or technologies with military applications as defined in the Commerce Control List of the Export Administration Regulations; or

"(vii) an offense with respect to which the United States would be obligated by a multilateral treaty either to extradite the alleged offender or to submit the case for prosecution, if the offender were found with the territory of the United States."

(2) in subparagraph (D)

(A) by inserting "[s]ection 541 (relating to goods falsely classified)," before "[s]ection 542";

(B) by inserting "[s]ection 922(l) (relating to the unlawful importation of firearms), [s]ection 924(m) (relating to firearms trafficking)," before "[s]ection 956";

(C) by inserting "[s]ection 1030 (relating to computer fraud and abuse)," before "1032";

(D) by inserting "any felony violation of the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. § 611 *et seq.*)," before "or any felony violation of the Foreign Corrupt Practices Act"; and

(3) in subparagraph (E), by inserting "the Clean Air Act (42 U.S.C. § 6901 *et seq.*)," after "the Safe Drinking Water Act (42 U.S.C. §300f *et seq.*)."

(b) NATIONAL SECURITY. — Section 1956(d) of [T]itle 18, United States Code, is amended by adding the following at the end after the period:

"This [s]ection does not pertain to any official act by a representative of, or an act which is authorized by and conducted on behalf of, the United States Government."

SEC. 10. FORFEITURE FOR VIOLATIONS OF SECTION 6050I

Sections 981(a)(1)(A) and 982(a)(1) of [T]itle 18, United States Code, are amended by inserting ", or of [s]ection 6050I of the Internal Revenue Code of 1986 (26 U.S.C. § 6050I)" after "of [T]itle 31."

SEC. 11. CRIMINAL FORFEITURE FOR MONEY LAUNDERING CONSPIRACIES.

Section 982(a)(1) of [T]itle 18, United States Code, is amended by inserting ", or a conspiracy to commit any such offense" after "of this title."

SEC. 12. FUNGIBLE PROPERTY IN BANK ACCOUNTS.

Section 984 of [T]itle 18, United States Code, is amended —

(1) by striking subsection (a) and redesignating the remaining subsections as (a), (b), and (c), respectively;

(2) by amending subsection (b) (as redesignated) to read as follows:

"(b) The provisions of this [s]ection may be invoked only if the action for forfeiture was commenced by a seizure or an arrest *in rem* within two years of the offense that is the basis for the forfeiture";

(3) by amending subsection (c)(1) (as redesignated) to read as follows:

"(c)(1) Subsection (a) shall not apply to an action against funds held by a financial institution in an interbank account unless the account holder knowingly engaged in the offense that is the basis for the forfeiture";

(4) by adding the following new paragraph to subsection (c) (as redesignated):

"(3) As used in this subsection, a "financial institution" includes a foreign bank, as defined in paragraph 7 of [s]ection 1(b) of the International Banking Act of 1978"; and

(5) by adding the following new subsection:

"(d) Nothing in this [s]ection is intended to limit the ability of the [G]overnment to forfeit property under any statute where the property involved in the offense giving rise to the forfeiture or property traceable thereto is available for forfeiture."

SEC. 13. SUBPOENAS FOR BANK RECORDS.

Section 986 of [T]itle 18, United States Code, is amended —

(1) in subsection (a), —

(A) by striking "[s]ection 1956, 1957 or 1960 of this [T]itle, [s]ection 5322 or 5324 of [T]itle 31, United States Code" and inserting "[s]ection 981 or 982 of this title";

(B) by inserting "before or" before "after";

(C) by striking "*in rem*"; and

(D) by striking the last sentence.

(2) in subsection (c), by inserting "or Criminal" after "Civil."

SEC. 14. FUGITIVE DISENTITLEMENT.

(a) IN GENERAL. — Chapter 163 of [T]itle 28, United States Code, is amended by inserting the following new [s]ection:

"§ 2467. Fugitive disentitlement."

"Any person who, in order to avoid criminal prosecution,

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purposely leaves the jurisdiction of the United States, declines to enter or re-enter the United States to submit to its jurisdiction, or otherwise evades the jurisdiction of the court where a criminal case is pending against the person, may not use the resources of the courts of the United States in furtherance of a claim in any related civil forfeiture action or a claim in third-party proceedings in any related criminal forfeiture action."

(b) CONFORMING AMENDMENT. — The chapter analysis for chapter 163 of [T]itle 28, United States Code, is amended by inserting the following at the end:

"2467. Fugitive disentitlement."

SEC. 15. ADMISSIBILITY OF FOREIGN BUSINESS RECORDS.

(a) IN GENERAL. — Chapter 163 of [T]itle 28, United States Code, is amended by adding at the end the following new [s]ection:

"§ 2468. Foreign Records."

"(a) In a civil proceeding in a court of the United States, including civil forfeiture proceedings and proceedings in the United States Claims Court and the United States Tax Court, a foreign record of regularly conducted activity, or copy of such record, obtained pursuant to an official request, shall not be excluded as evidence by the hearsay rule if a foreign certification, also obtained pursuant to the same official request or subsequent official request that adequately identifies such foreign record, attests that—

"(1) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

"(2) such record was kept in the course of a regularly conducted business activity;

"(3) the business activity made such a record as a regular practice; and

"(4) if such record is not the original, such record is a duplicate of the original; unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

"(b) A foreign certification under this [s]ection shall authenticate such record or duplicate.

"(c) As soon as practicable after a responsive pleading has been filed, a party intending to offer in evidence under this [s]ection a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

"(d) As used in this [s]ection, the term —

"(1) "foreign record of regularly conducted activity" means a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country;

"(2) "foreign certification" means a written declaration made and signed in a foreign country by the custodian of a record of regularly conducted activity or another qualified person, that if falsely made, would subject the maker to criminal penalty under the law of that country;

"(3) "business" includes business, institution, association, profession, occupation, and calling of every kind whether or not conducted for profit; and

"(4) "official request" means a letter rogatory, a request under an agreement, treaty or convention, or any other request for information or evidence made by a court of the United States or an authority of the United States having law enforcement responsibility, to a court or other authority of a foreign country."

(b) CONFORMING AMENDMENT. — The chapter analysis for chapter 163 of [T]itle 28, United States Code, is amended by inserting the following at the end: "2468. Foreign Records."

SEC. 16. CHARGING MONEY LAUNDERING AS A COURSE OF CONDUCT.

(1) Section 1956(h) of [T]itle 18, United States Code, is amended —

(1) by inserting "(1)" before "Any person"; and

(2) by adding the following new paragraph after the period:

"(2) Any person who commits multiple violations of this [s]ection or [s]ection 1957 that are part of the

same scheme or continuing course of conduct may be charged, at the election of the [G]overnment, in a single count in an indictment or information."

SEC. 17. PROPERTY CONSTITUTING PROCEEDS OF SPECIFIED UNLAWFUL ACTIVITY.

(a) Section 1956. — Section 1956(c) of [T]itle 18, United States Code, is amended by adding the following after paragraph (8):

"(9) a transaction "involves the proceeds of specified unlawful activity" if the transaction involves a bank account in which the proceeds of specified unlawful activity have been commingled with other funds.

(b) SECTION 1957. — Section 1957(f) of [T]itle 18, United States Code, is amended by adding the following after paragraph (3):

"(4) a "monetary transaction in criminally derived property that is of a value greater than $10,000" includes —

"(A) a monetary transaction involving the transfer, withdrawal, encumbrance or other disposition of more than $10,000 from a bank account in which more than $10,000 in proceeds of specified unlawful activity have been commingled with other funds; and

"(B) a series of monetary transactions in amounts under $10,000 that exceed $10,000 in the aggregate and that are closely related to each other in terms of time, the identity of the parties involved, the nature of the transactions and the manner in which they are conducted."

(c) TECHNICAL AMENDMENT. — Section 1956(c)(7)(F) is amended by adding ", as defined in [s]ection 24" before the period.

SEC. 18. VENUE IN MONEY LAUNDERING CASES.

Section 1956 of [T]itle 18, United States Code, is amended, by adding at the end the following subsection:

"(i) Venue. — (1) Except as provided in paragraph (2), a prosecution for an offense under this [s]ection or [s]ection 1957 may be brought in any district in which the financial or monetary transaction is conducted, or where a prosecution for the underlying specified unlawful activity could be brought.

"(2) A prosecution for an attempt or conspiracy offense under this [s]ection or [s]ection 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place."

SEC. 19. TECHNICAL AMENDMENT TO RESTORE WIRETAP AUTHORITY FOR CERTAIN MONEY LAUNDERING OFFENSES.

Section 2516(1)(g) of [T]itle 18, United States Code, is amended by striking "a violation of [s]ection 5322 of [T]itle 31, United States Code (dealing with the reporting of currency transactions)" and inserting "a violation of [s]ection 5322 or 5324 of [T]itle 31, United States Code (dealing with the reporting and illegal structuring of currency transactions)."

GPML Combats Money Laundering

By Andrew Aulisi, GPML, United Nations

The year 1997 marked the beginning of the United Nations Global Programme Against Money Laundering (GPML), based in Vienna, Austria. Operating under the Office for Drug Control and Crime Preventions, GPML involves technical cooperation and research projects aimed at providing member states with the means to combat money laundering.

GPML's technical cooperation activities vary widely according to scope and geographic representation. On a broad level, GPML hosts regional conferences to increase awareness of the money laundering problem and to support political advocacy for the adoption of national anti-money laundering strategies. This support includes legal advice and assistance on national legislation and international treaties, as well as the development of Financial Intelligence Units (FIUs). GPML includes activities that are focused on practical measures, especially training workshops for national officials in the judicial, law enforcement, and financial sectors. These workshops are tailored to certain topics — such as investigative techniques, international law, and mutual assistance — and the detection and reporting of suspicious transactions.

The United Nations has designed research and analysis projects in order to provide member states with better understanding of the money laundering phenomenon, and to assist the international community in elaborating effective countermeasures. Research

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currently underway includes key issues such as the nature of bank secrecy and offshore financial centers and the burden of proof in confiscation proceedings. GPML is working with other inter-national organizations to develop an Internet web site on money laundering matters (www.imolin.org), including a database of laws and regulations.

In addition to promoting legislation that criminalizes money laundering, one area of interest that strongly concerns GPML is the establishment and support of financial intelligence units, which are integral to effective law enforcement. To this end, GPML is evaluating a set of advisory services to include the conception and establishment of FIU's study tours for newly established FIU managers, and training of FIU staff on money laundering investigations.

The implementation of GMPL is carried out in cooperation with other international, regional, and national organizations and institutions, including banking associations, FIU, and various institutions with the United Nations such as UNDP, ISPAC, and ISISC.

Notable Cases

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checks would be covered by checks drawn on other Maulden accounts which also had insufficient funds, in order to avoid the interest that would be charged if the NSF checks would be recorded as overdraft loans. The NSF checks would be covered by funds within a period of a few days, but in the meantime Maulden had received interest-free, unrecorded loans without the prior approval of the board of directors.

Maulden and Christo were convicted of violations of 18 U.S.C. §§ 656 and 1344, and Maulden was also convicted of money laundering under section 1957 based on the withdrawal of funds to pay several $25,000 NSF checks he wrote to pay off another outstanding loan at SouthTrust Bank. The indictment alleged that each withdrawal involved funds derived from misapplication of bank funds and bank fraud. The Eleventh Circuit reversed section 1957 convictions, concluding that the facts were insufficient to establish that Maulden engaged in a monetary transaction that was separate from and in addition to the underlying criminal activity. The court held that the crimes of bank fraud and misapplication of bank funds were incomplete and had generated no proceeds to be laundered until Bay Bank disgorged its funds by the payment of the checks to SouthTrust Bank. Therefore, the withdrawal of funds charged as money laundering was one and the same as the underlying criminal activity of bank fraud and misapplication of bank funds, and the money laundering convictions had to be reversed.

United States v. Christo, 129 F.3d 578 (11th Cir. 1997).

Money Laundering/ Proceeds/Concealment/ Interstate Commerce

Quick Notes:

- Evidence that a defendant's cash outflow in a financial transaction exceeds his legitimate income, in conjunction with evidence that the defendant is engaged in drug trafficking, is sufficient to show that the purchase of two automobiles involves the proceeds of drug trafficking, even if the defendant claims income from other sources.
- There is sufficient evidence to establish concealment, even though the defendant possessed and drove a car purchased with drug proceeds, where other parties negotiated and signed the papers for the car, where the car was registered in the name of a third party, and where the defendant used a third party's name when he brought the car in for repairs.
- There is sufficient evidence to establish that the purchase of a car with drug proceeds affected interstate commerce because all cocaine distributed in the United States is manufactured outside the country. Also, the purchase of the car facilitated the cocaine trafficking because the defendants used the car in their cocaine business and the purchase of the car with drug proceeds "cleaned" a large amount of drug proceeds, making it easier for the defendants to continue their conspiracy.

United States v. Westbrook, 119 F.3d 1176 (5th Cir. 1997).